SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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**No.** 465

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AIR TRANSPORT ASSOCIATES, INC.,
*Petitioner,*

vs.

CIVIL AERONAUTICS BOARD,
*Respondent*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.**

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Air Transport Associates, Inc., petitioner, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on July 10, 1952 (R. 1110), which order affirmed an order of the Civil Aeronautics Board [1] revoking petitioner's license as an air carrier and prohibiting it from continuing to engage in air transportation.

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[1] Hereinafter referred to as "the Board."

## Opinions Below

The opinion (R. 15-25) of the Board is partially reported at 1A Avi. L. R., 21,406 (CCH). The dissenting opinion by Adams, Member, Civil Aeronautics Board (R. 25-26) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 1101-1110), is not yet reported.

## Jurisdiction

The order of the United States Court of Appeals for the District of Columbia Circuit was entered on July 10, 1952 (R. 1110), and petitioner's Motion to Hold in Abeyance pending decision by this court of questions involving the validity of respondent's regulation, which had been certified to the court,[2] and for a Rehearing, were denied on October 3, 1952 (R. 1143).

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[2] The opinion of this Court, entered October 20, 1952, in *C.A.B.* v. *American Air Transport*, case No. 126, October Term, 1952, stated:

"*Per Curiam.*

"The certificate is dismissed. *Labor Board* v. *White Swan Co.*, 313 U.S. 23 (1941); *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160 (1936); *White* v. *Johnson*, 282 U.S. 367 (1931); *United States* v. *Union Pacific R. Co.*, 168 U.S. 505 (1897).

"The Civil Aeronautics Board has applied to this Court for an order requiring the Court of Appeals to send up the entire record. To grant such an applicatian would bring 'the entire matter in controversy' before the Court for decision. 28 U.S.C. sec. 1254(3).

"Since the certificate must be dismissed, the Court should not exercise its discretionary power to bring up "the entire matter in controversy' for review. See *Cleveland-Cliffs Iron Co.* v. *Arctic Iron Co.*, 248 U.S. 178 (1918). Perhaps the Court of Appeals may now wish to hear this case *en banc* to resolve the deadlock indicated in the certificate and give full review to the entire case. This Court does not normally review orders of administrative agencies in the first instance; and the Court does not desire to take any action at this time which might foreclose the possibility of such review in the Court of Appeals.

"For these reasons the Board's application is denied.

"MR. JUSTICE DOUGLAS dissents."

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1), and Section 1006(f) of the Civil Aeronautics Act, as amended, 52 Stat. 1025, 49 U.S.C. 646(f).

## Questions Presented

1. Where a license granting operating authority is issued by the Board to an air carrier, which acquires property and business while operating thereunder, may the Board thereafter issue and lawfully enforce a new regulation which amends the carrier's license and substantially injures and destroys its property interests and business by diminishing and curtailing its operating authority, in the absence of an adjudicatory hearing upon the regulation prior to its issuance as prescribed by the Administrative Procedure Act?

2. Under the foregoing circumstances, in which no question of safety is involved, could the court below properly conclude that the amended regulation (which imposes a crippling restriction upon the permissible number of flights of petitioner, and thus substantially injures and in large part destroys petitioner's existing property and business) is a reasonable or proper definition of the terms "regularly or with a reasonable degree of regularity"[3] as previously

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[3] Section 292.1 of the Board's Economic Regulations effective July 15, 1948, and in force when letter was written petitioner transmitting its authority to commence business (R. 343) provided:

"• • • (b) Classification. There is hereby established a classification of non-certificated air carriers to be designated as 'Irregular Air Carriers'. The term 'irregular air carrier' means any air carrier which (1) directly engages in air transportation, (2) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, or (3) does not operate or hold out to the public, expressly or by course of conduct that it operates, one or more aircraft between designated points, or within a designated point, *regularly or with a reasonable degree of regularity* upon which aicraft it accepts for transportation, for compensation or for hire, such members of the public as apply therefor or

prescribed for the original license, in the absence of evidence and studies of actual operations of regular and irregular carriers?

3. Where a license is granted pursuant to a regulation adopted through proper rule-making procedure, which regulation defines permissible operations in general terms (i.e., "does not hold out a regular service"), and a licensee commences operations and makes a business investment in reliance upon such regulation, may the agency thereafter lawfully issue a document called an "interpretation" but having the force of a regulation, which document substantially curtails and restricts the prior definition of permissible operations without complying with the rule-making procedures set forth in the Administrative Procedure Act?[4]

4. In cases involving the revocation of irregular air carriers' licenses because of frequency of operations, may the Board reject and refuse to consider evidence of the "development of its business and the demands of the public"[5] for such transportation and evidence of the extent to which a carrier served the public demands and public interest in the operations upon which the complaint was brought?

5. If the Board believed petitioner's operations violated the so-called "interpretation" of the regulation, should not

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such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. * * * Within the meaning of this definition a 'point' shall mean any airport or place where aircraft may be landed or taken-off, including the area within a 25-mile radius of such airport or place."

[4] 5 U.S.C. 1008(b).

[5] Sec. 401(f) Civil Aeronautics Act, 49 U.S.C. 481(f) provides in part:

". . . No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. . . ."

the agency have followed, in the words of Member Adams who dissented below,

> "the more orderly procedure of issuing a cease and desist order prior to considering revocation"? (R. 25)

6. Unless a cease and desist order or other document is issued in the name of, and by authority of, *the agency*,[6] calling the attention of the licensee to conduct which would warrant revocation, may the agency lawfully revoke the license in view of the provisions of the Civil Aeronautics Act[7] and the Administrative Procedure Act?[8]

7. Where there was a dispute between petitioner and the chief of one of the subordinate offices of an agency with respect to the legality and interpretation of a regulation not involving safety, may the agency resolve the dispute against the carrier, at the same time declare its conduct to constitute "willfulness" and then, without issuing an order commanding obedience and giving petitioner an opportunity to first achieve compliance, lawfully issue an order which:

> (1) declares petitioner to be in "willful" violation,
> (2) orders it to "cease and desist" from operating in violation of the Board's interpretation of the regulation, and
> (3) simultaneously revokes its license?

## Statutes and Regulations Involved

The pertinent sections of the Civil Aeronautics Act and the Administrative Procedure Act here involved are set forth in the Appendix to this petition.

## Summary of the Matter Involved

Petitioner, Air Transport Associates, Inc., is a large irregular carrier, engaging in the air transportation of per-

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[6] All italics in this petition supplied unless otherwise indicated.

[7] Sec. 401(h) Civil Aeronautics Act, 49 U.S.C. 481.

[8] 5 U.S.C. 1008(b).

sons and property. Petitioner commenced its operations in July, 1948. At that time the Board had in effect a regulation which permitted a large irregular air carrier to engage in air transportation without a certificate of public convenience and necessity (R. 352-364). A "large irregular" carrier was defined as an air carrier "which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points . . . regularly . . ." (R. 358). The regulation further required an irregular air carrier to apply for and obtain a Letter of Registration. Petitioner acquired such a Letter of Registration and provided a new and specialized type of air service, particularly a low cost air coach service for passengers and a low cost air freight service. Petitioner was able to provide an air coach service between these places at substantially lower charges than other airlines charged for their de luxe services. The charges were established by tariffs duly filed with the Board. Petitioner's low cost operations are in the public interest and serve the little people who make up the bulk of Americans—the working people, the housewives, the soldiers, the sailors and the family groups.

After petitioner acquired its license, the Board, on December 10, 1948, announced, *without notice or hearing*,[9] a so-called "Interpretation Number 1" (R. 57-63) of its regulations governing large irregular air carriers. This interpretation contained a series of examples of permissible and nonpermissible operations, each of which considerably altered and changed the extent of the service which petitioner was permitted to perform under the previous regulation. Specifically, the interpretation adopted, without fol-

[9] And not complying with either rule-making or adjudicatory procedures prescribed by §§ 4(a) and 5(b) of the Administrative Procedure Act. 5 U.S.C. 1003(a) and 1004(b)

lowing either rule-making or adjudicatory procedures, altered petitioner's license in the following respects:

> 1. For the first time, "breaks" in service were required, and such breaks were stated to be in terms of weeks, whereas theretofore there was no requirement that a carrier suspend for any period of time the operations between any two cities;
> 2. The interpretation was so written that trips on more days per month would have to be considered in excess of the limit permitted irregular carriers.

The Board also adopted other regulations without any adjudicatory hearings, each of which placed new and additional interpretations upon the extent to which large irregular carriers could provide a public service. On May 20, 1949, the Board terminated the blanket exemption for large irregular carriers and provided for the termination of the Letters of Registration unless individual application for a special exemption order was seasonably filed. Petitioner complied with this requirement, but its application for exemption has not yet been finally determined by the Board.

After petitioner had been operating its low cost service for 18 months, respondent, on December 28, 1949, directed petitioner to show cause (R. 71-73) why its Letter of Registration should not be revoked.

No question of public safety is involved in the instant case. No question of improper treatment of any passenger or shipper is involved. The only part of petitioner's operations involved in this proceeding is the number of trips upon which petitioner provided low cost air service between the United States and Alaska.

After hearing, the Board issued an Opinion and Order (R. 15-30) which revoked petitioner's Letter of Registration and directed petitioner to cease and desist from engaging either directly or indirectly in air transportation. Member Adams

dissented from the decision to summarily stop petitioner's operations (R. 25). The sole reason assigned by the Board for its order is that petitioner operated more frequently and regularly than the Board considered permissible under its regulations.

Petitioner filed a petition for review (R. 1-63) of the Board's action in the United States Court of Appeals for the District of Columbia Circuit. That court affirmed the order of the Board (R. 1100-1110), but stayed the effective date of the order pending the filing of this petition for certiorari (R. 1150-1151).

**Specification of Errors to Be Urged**

The Court of Appeals erred:

1. In holding that the regulation used by the Board as a basis for revoking petitioner's license, adopted December 10, 1948 (R. 57-63), was lawful and properly applicable to petitioner when that regulation, which amended petitioner's license and substantially injured and destroyed its property and business by diminishing and curtailing its pre-existing operating authority, was not adopted as a result of either a rule-making or adjudicatory procedure (R. 1108).

2. In holding that the "interpretation" and the subsequent regulations issued without adjudicatory hearings, even if such regulations were lawfully promulgated, did not establish new criteria for determining whether flights were frequent and regular (R. 1108), because such regulations did adopt new and different standards and thereby destroyed petitioner's property and business rights by imposing a crippling restriction upon the permissible number of flights.

3. In affirming the Board's decision in the absence of

evidence as to whether the regulation sought to be enforced against petitioner was a reasonable definition of the previously undefined term "regularly or with a reasonable degree of regularity," because without this evidence, the decision of the court below conflicts with the applicable decision of this court in the case of *Brady Transfer and Storage Co.* v. *United States*, 80 Fed. Supp. 110, affirmed in 335 U. S. 875, 93 L. Ed. 418, 69 S. Ct. 239.

4. In holding that the Board complied with the requirements of law[10] that *the agency* call the attention of the licensee to facts or conduct which might warrant a withdrawal of the license, before instituting proceedings therefor, and providing petitioner with an opportunity to achieve compliance before its license was revoked.

5. In holding that it was not necessary for the Board to take into consideration the nature of the services performed by irregular air carriers operating between the United States and Alaska when it attempts to apply to petitioner the new regulations including the "interpretation" adopted December 10, 1948 without any kind of notice or hearing.

6. In failing to pass upon petitioner's contention that the Board improperly rejected evidence of the development of petitioner's business, the "demands of the public" for such transportation, and the extent to which petitioner served the "public interest" in the operations against which the complaint is made.

7. In affirming the Board's decision, when the Board's regulation upon which its decision was based, erroneously applied standards designed for domestic air transportation to petitioner's operations between the United States and Alaska, where different economic conditions exist.

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[10] 5 U.S.C. 1008(b); Section 401(h), Civil Aeronautics Act, 49 U.S.C. 481(h).

8. (a) In affirming the Board's holding that flights to Paine Field and Boeing Field, which are 26 miles apart, were flights to the same point.[11]

(b) In holding that petitioner "held out a regular Seattle service by means of Paine flights."

9. In holding that the interpretation or amendment to the regulation adopted December 10, 1948, was not a "just and reasonable regulation" as required by Section 416 of the Civil Aeronautics Act (49 U.S.C. 496).

## Reasons for Granting the Writ

This case presents a question of public importance relating to the application of the Civil Aeronautics Act with respect to the impact upon the irregular carrier segment of the air transportation industry, of a regulation limiting the frequency and regularity of operations of such air carriers. This regulation is presently being enforced against many air carriers in proceedings now pending before the Board and proceedings under judicial review. Its validity is challenged here and in these other proceedings. This is the first time this question is before this court for decision, although the court below filed with this court a statement on June 12, 1952 (No. 126, October Term, 1952), certifying four questions to this court for determination, two of which are presented in the instant case. In certifying questions to this court, because of three conflicting views by the Circuit judges, the Court of Appeals stated in their certificate to this court that it was their unanimous opinion that these questions were "of far reaching and fundamental importance in the field of administrative law." While this

[11] Part 291.1(b) of the Economic Regulations of the Board, effective July 1, 1949, provides:

". . . The term 'point' as used in this part shall mean any airport or place where aircraft may be landed or taken off, including the area within a 25-mile radius of such airport or place."

court dismissed the certificate, this court recognized the importance of the issues by suggesting that the Court of Appeals may wish to hear the case *en banc*.[12] The same fundamental issue is here involved. Unless the court takes jurisdiction of this case and decides this important question in the field of administrative law, the validity of the Board regulation and similar regulations adopted in the same way by other governmental agencies without complying with the requirements of the Administrative Procedure Act will remain unsettled.

A decision by this court now will be helpful to not only petitioner and every other irregular air carrier of which 55 transported more than 55 million passenger and cargo miles (R. 637), for the period July, 1949 through June 1950, but should likewise be helpful to and welcomed by respondent in its duty in administering the Civil Aeronautics Act.

As was pointed out by the Senate Committee which investigated the status of the carriers in the class to which petitioner belongs [13] the operations of these irregular carriers, sometimes termed "nonscheduled" carriers, required a bare minimum of 14 to 15 flights a month between the same points as economically necessary to justify their continued operations. The regulation in question, if valid, jeopardizes the economic strength of these carriers to such an extent that they cannot continue their operations and meet their operating expenses. Petitioner, as well as the other members of this important industry—small businessmen—respectfully urges this court to recognize their predicament by taking jurisdiction in the instant case and granting the relief to which they believe they are justly entitled under the law.

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[12] Instead the Court of Appeals remanded the case for taking evidence of actual operations of regular and irregular carriers.

[13] Senate Select Committee on Small Business, Senate Report No. 540, 82nd Congress, First Session.

As was pointed out by the Senate Committee, the regulation of irregular carriers involves not merely the legitimate right of citizens to engage in a competitive enterprise, but also "involves a broader public interest—that of determining the kind of civil aviation which America is to have in the future [14] and "it is the opinion of the Committee that the nonscheduled air carriers constitute an asset that the Nation ought not to lose."

Petitioner, as well as the 54 other irregular carriers,[15] many of whom are involved in enforcement proceedings involving this same regulation, are vitally concerned in the issue of whether this regulation was lawfully promulgated. Petitioner here urges that the regulation was not adopted through procedures which comply with the Administrative Procedure Act.[16]

If this regulation is valid, it will have the effect of practically eliminating this important segment of our air transportation industry, which brings low cost transportation within range of the working man, the housewife, the soldier, the sailor—the middle income group of working Americans.

The regulations adopted December 10, 1948 and July 1, 1949 violate the due process clause of the Fifth Amendment in that they were invalid for uncertainty and were discriminatory because they imposed a classification with accompanying restrictions upon irregular carriers without any reasonable relation to the purpose of the Civil Aeronautics Act.

The new regulations amend petitioner's license in fact, by prescribing more restrictive rules; this action deprived petitioner of the utilization of its property in a lawful business.

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[14] Page 18 of above report.

[15] Page 19 of above report.

[16] Section 9(b), 5 U.S.C. 1008(b) and Sections 4(a) and (b), 5 U.S.C. 1003(a) and (b).

Petitioner was granted an authorization to operate and was engaged in business. Petitioner made the necessary investment and began his operations; he has a license. *Standard Airlines* v. *Civil Aeronautics Board,* 85 App. D.C. 29, 177 F. 2d, 18.

As was said in re: *Carter* 177 F. 2d 75:

> "Once granted, the license becomes a right and due process of law must be followed to achieve deprivation. This is true, even though the license is a severely qualified one, such as a radio license.[17] . . . the deprivation of that right, once granted, is a judicial act, requiring due process of law."

The regulation of December 10, 1948 deprived petitioner of property rights and to be valid must be the result of an adjudicatory hearing. In no other way can there be due process of law. *Columbia Broadcasting Company* v. *United States,* 316 U.S. 407; *Interstate Commerce Commission* v. *Louisville and N. R. Company,* 227 U.S. 88, 93. It follows, therefore, that the amended regulation formed no basis upon which to measure the legality of petitioner's conduct.

This case presents an important issue in the field of administrative law which this Court should pass upon. The court below apparently did not realize the full significance of the arguments which petitioner advanced. There are here involved two regulations, one of which, it is submitted, is void for failure on the part of the Board to comply with rule-making requirements. The other may not be lawfully applied to petitioner unless adjudicatory hearings are first held.

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[17] Citing *National Broadcasting Co.* v. *Federal Communications Commission,* 319 U.S. 239, and *Ashbacher Radio Co.* v. *Federal Communications Commission,* 326 U.S. 327.

*The December 10, 1948 Regulation*

The Board adopted a general regulation permitting the air carriers to operate on a nonscheduled or irregular basis. The Board defined an irregular carrier as one "which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points regularly." After petitioner had secured its operating rights under this general regulation and had made an investment relying upon such regulation, the Board issued, on December 10, 1948, an "interpretation" of the meaning of the previously undefined terms "regularly" or "with a reasonable degree of regularity." This "interpretation" was not adopted in accordance with the rule-making provisions of the Administrative Procedure Act. No notice was given and no opportunity was given petitioner or anyone else to participate in making the definition. Petitioner has demonstrated that the new interpretation and definition substantially curtails and injures petitioner's business. Petitioner sought to show in the proceeding before the Board that the definitions contained in the new interpretation should not be applicable to operations between the United States and Alaska. The Board refused to accept this evidence. Without complying with the Administrative Procedure Act, the Board issued its "Interpretation" on December 10, 1948 (see appendix 47) which is in effect a new regulation. An analysis of the standards fixed by the new regulation shows clearly that for the first time it required an irregular carrier to have "breaks in service." While nonscheduled operations under the old regulation were partly of a nonrecurring nature, it was never believed by the industry that operations between the same two points for two weeks would necessarily have to be followed by a complete cessation of all flying between the same points for a similar period of two weeks.

Irregular carriers believed that they could provide nonscheduled service over substantially longer periods of time. For example, some operated between New York and Miami during the winter season which lasts for several months. Petitioner and others operated most of their flights to Alaska during the summer season when the migratory fishermen and cannery workers demanded additional air services. The "Interpretation", however, has limited seasonal service to periods of weeks instead of to periods of months.

*The 1949 Regulation*

The old (1947) regulation provided that a carrier could operate on a nonscheduled basis if it did not hold out to the public that it would operate a regular service between designated points. There was no limitation upon the number of trips to be operated. The 1949 regulation states that an irregular carrier may not *operate* or hold out a regular service. This is a real change in the nature and character of the nonscheduled business. Under the 1949 regulation, as under the December 10, 1948 regulation or "Interpretation", a carrier can no longer operate an unlimited number of trips. The 1948 and 1949 regulations thus constituted a new and severe restriction on petitioner's business and a drastic alteration of petitioner's license.

The court below failed to recognize that there was a distinction between the 1947 and the later Dec. 10, 1948-July 1, 1949 [18] regulations. It is these later regulations which are of paramount importance to irregular air carriers. Obviously, they are not the same as the 1947 regulation.

The Board should have considered petitioner's evidence with respect to the difference between operations within the United States and operations to Alaska either at the time the Board announced its interpretation or at the time

[18] See appendix for these 3 regulations.

the Board attempted to force petitioner to comply with this interpretation. The Court below fell into basic error by not recognizing this point. The Administrative Procedure Act was expressly designed for the purpose of permitting licensees operating under Federal regulatory authority to participate in the formulation of regulations. That is the purpose of Section 4 of that Act (5 U. S. C. 1003).

There exist basic, inherent, deep and fundamental differences in the type and character of air transportation services performed by petitioner between Seattle and Anchorage and Fairbanks, Alaska, and those customarily performed by other large irregular air carriers within the continental United States. These differences must be recognized in order for the Board to properly regulate this service in the interest of the people of Alaska and to afford just regulation of petitioner's activities.

The first and most important of Alaska's air transportation needs is for adequate, low-cost cargo service. The evidence presented in the *Alaska Service Case* (C.A.B. Docket No. 3286, *et al.*) indicated that Alaska uses 15 times the amount of passenger air transportation *per capita* as does the continental United States, confirming that air transportation is used by all income levels in the absence of alternative forms of transportation; and that Alaskans use 114 times more air cargo transportation per capita, proving that air cargo transportation is needed more than passenger transportation.

While cargo service in the continental United States is principally expedited packages, much of the cargo transported to Alaska constitutes the necessities of everyday life, chiefly airborne perishables. These commodities are the produce, fruits, fresh eggs, meat and fresh milk that reach most Anchorage and Fairbanks households. Lack

of these commodities would seriously affect the standard of living of Alaskans, who do not have the alternative rail, bus and motor freight services which are available in the States, whereas lack of air cargo service in the United States would, at most, be only an inconvenience.

Unlike large irregular air carrier service within the United States, which is handled almost solely in all-passenger loads at a higher profit margin, petitioner in its U. S.-Alaska operations must do a volume operation on combination cargo-passenger service at a low profit margin. Its necessary frequency or volume of service, therefore, has been the cause of the Board's enforcement action. The economic conditions giving rise to the enforcement action were peculiar to the Alaska-U. S. service and hence the regulations applicable to domestic transportation between the States are inapplicable, although the Board in its enforcement order has applied regulations governing domestic flights to overseas flights between Seattle and Alaska. This is an erroneous application of the regulation which does not recognize the underlying economic principles. To apply the domestic regulations to overseas Alaskan operations is fundamentally and basically wrong because of the surrounding circumstances.

An Alaskan Task Force, appointed by the United States Senate, in its seventh report to the Senate of the Preparedness Subcommittee of the Committee on Armed Services, under the authority of S. Res. 18, 82nd Congress, First Session, gave the results of its study of Alaska from the standpoint of national defense. The Chairman of that Committee, in his Letter of Transmittal of the Report, dated February 13, 1951, stated:

> "At the outset of the Preparedness Subcommittee's work, we agreed that no outpost of America's defenses was of greater strategic importance than Alaska. To ascertain the state of our defenses in Alaska, three-

member task force—Senator Hunt, chairman; Senators Morse and Saltonstall—undertook an on-the-site investigation. The investigation has been supplemented by extensive studies and inquiries here in Washington. The result of their painstaking, diligent, and vigorous labors is the attached report.

"A strong Alaska is essential to our security. Our continental defenses can be no stronger than our Alaskan defenses. The security of every American home begins in the snows of Alaska."

In this report (at page 54) it was stated:

"Vast distances and rugged terrain have made the airplane the accepted medium of transportation in Alaska. The percentage of freight and passengers transported by air is 30 times higher in Alaska than in the United States. In addition, air travel has done much to promote the growing Alaskan tourist industry."

The conclusions of this Committee mentioned the fact that (at page 38):

". . . Regulations that are designed to meet the requirements of commercial flying in interstate commerce in the United States should not be applied within Alaska unless local conditions indicate that they are desirable."

The Board, to a limited degree, has recognized the necessity for greater frequency of flights between the States and Alaska because conditions peculiar to the Territory of Alaska would make such a limitation unduly restrictive over that permitted in domestic service (R. 759). Petitioner, realizing that its service was in a peculiar or different class as recognized by the Board than the domestic transportation permitted by Part 291.16 of the Board's Economic Regulations, believed the Board would define permissible frequency and regularity by a cease and desist

order (R. 760) if its final decision was that petitioner's operations were in excess of those permitted, and proceeded on the premise that the Board would allow a greater latitude of frequency and regularity to Alaska than elsewhere because of the different economic conditions there and would, by its cease and desist order, indicate such permissive regularity and frequency. This was the action the dissenting Board member felt should be taken in this case (R. 25-26) as had been followed in other cases handled by the Board in dealing with this problem. However, instead of issuing such an order, the Board revoked petitioner's license for knowingly and willfully violating the regulations without giving petitioner an opportunity to achieve compliance.

The failure in this case to give adequate notice and opportunity for compliance is just as much a "hacking away" at the Administrative Procedure Act as the Board's action in attempting to limit irregular carriers to 3 and 8 trips per month, which action was recently held to be invalid by Judge Bastian in *American Air Transport, et al.* v. *Civil Aeronautics Board, et al.*, 98 F. Supp. 660, which was certified to this Court. (See footnote 2.)

The Examiner's conclusion as set forth at the top of page 19 of his report (R. 547) that

> ". . . anything less than revocation of the existing authority of the carrier will be unsuccessful in obtaining compliance by this carrier with the provisions of the Civil Aeronautics Act and the rules and regulations issued thereunder * * *"

is illogical and a conclusion clearly erroneous because it is obvious that if petitioner's Letter of Registration is revoked, it will be in no position to comply with any rule or regulation issued under the Civil Aeronautics Act.

Therefore, the very purpose of proposing sanctions upon this petitioner is defeated by the sanction imposed.

THE COURT ERRED IN FAILING TO PASS UPON PETITIONER'S CONTENTION THAT THE BOARD IMPROPERLY REJECTED EVIDENCE OF THE DEVELOPMENT OF ITS BUSINESS, AND THE "DEMANDS OF THE PUBLIC" FOR SUCH TRANSPORTATION TO THE EXTENT TO WHICH PETITIONER SERVED THE "PUBLIC INTEREST" IN THE OPERATIONS AGAINST WHICH THE COMPLAINT IS BASED.

As petitioner, after being issued a license to operate, is entitled to the same protection as if he had a certificate as mentioned in Section 401 of the Civil Aeronautics Act (see argument in Point 4 above), he is likewise entitled to the protection afforded by Section 401(f) of the Civil Aeronautics Act which, when given effect, nullifies the action of the Board in revoking petitioner's license.

It has been the long standing policy of this Government to refrain from "freezing" the development of the country's transportation business in accordance with the demands of the public. That principle is written in Section 401(f) of the Civil Aeronautics Act. That language, it will be observed, is, in part, identical with the language contained in the Motor Carrier Act.[18a] Therefore, the development of the business and the demands of the public and the public interest is a cloak of protection thrown around

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[18a] 49 U.S.C. 481(f) provides "• • • No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service *as the development of the business and the demands of the public shall require.*"

49 U.S.C. 308(a) provides:

"• • • Provided, however, That no terms, conditions, or limitations (in the certificate) shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, *as the development of the business and the demands of the public shall require.*"

petitioner here, of which he has been stripped by the action of the court below in approving the decision of the Board, which body rejected and refused to consider evidence establishing the demands of the public and the public interest which petitioner served so well in meeting the public demand and public interest that the Board revoked its license.

THE COURT ERRED IN HOLDING THAT THE CIVIL AERONAUTICS BOARD COMPLIED WITH THE REQUIREMENTS OF LAW THAT THE AGENCY CALL THE ATTENTION OF THE LICENSEE TO FACTS OR CONDUCT WHICH MIGHT WARRANT A WITHDRAWAL OF THE LICENSE, BEFORE INSTITUTING PROCEEDINGS THEREFOR, IN ORDER THAT PETITIONER HAVE OPPORTUNITY TO ACHIEVE COMPLIANCE BEFORE ITS LICENSE WAS REVOKED.

Member Adams of the Civil Aeronautics Board directly raised this issue by his dissenting opinion. He said (R. 25-26):

> "I dissent, however, from the decision to revoke the Letter of Registration of Air Transport Associates, summarily stopping its operation, without first issuing an order to the carrier to *'cease and desist'* from continuing violations of the Board's regulations. The more orderly procedure of issuing a cease and desist order, prior to considering revocation of a Letter of Registration, has been followed in a majority of the cases handled by this Board in dealing with the problem of irregular carriers. I find no justification for taking a short cut in this case."

The court below (R. 1109) held that Section 401(h) of the Civil Aeronautics Act, requiring that the Board shall fix, *by its order*, a reasonable time within which to achieve compliance with any rule claimed to be violated, relates to public convenience and necessity and has no application here.

Section 401(a) of the Civil Aeronautics Act states that no carrier shall engage in air transportation without a cer-

tificate. This provision of law contradicts the conclusion of the court below. The mere fact that the Civil Aeronautics Board issued what it termed a "Letter of Registration" instead of terming this a "certificate" indicates that within the meaning of Section 401(a), such letter certainly is the equivalent of a certificate. No one can doubt that it was ~~not~~ the intention of the Board to issue a permit for petitioner to engage in air transportation. Certainly the fundamental protection given by the Civil Aeronautics Act cannot be brushed aside upon the mere technicality of words, as was attempted by the court below. Letters of Registration and certificates are both licenses and, as such, are equally entitled to the protection granted by the Civil Aeronautics Act.

This license or "Letter of Registration" was issued to encourage small operators to invest their capital and services in the development of air transportation, and the letter issued to petitioner achieved that result in this case. To hold that petitioner's investment is deprived of the protection afforded by the Act merely because the Board did not see fit to use the word "certificate" when it issued petitioner's license is no valid reason for depriving petitioner of the benefits afforded by the Act.

Consequently, petitioner is entitled to have a cease and desist order issued before its license is revoked. Such order must show in writing what violations are claimed and designate when compliance must be achieved. No such order having been issued in the instant case, it follows that the Board's order of revocation was unlawful.

This case presents an important question of due process of law. After an administrative agency adopts a regulation, pursuant to rate-making procedures, and a licensee relying on the regulation engages in business thereunder and acquires property and a business in so doing, the

agency promulgated a new regulation which, in fact, substantially injures or in large part destroys the licensee's property interests and business, without following the rule-making procedures, such action is void as to that licensee, unless an adjudicatory hearing is held because it is on its fact an amendment of the license. Under the same circumstances, does the validity of such new regulation as to the license depend upon a finding of fact that it does or does not in face vary the terms of the license?

On November 20, 1952, the court below remanded the case of *Civil Aeronautics Board, et al.* v. *American Air Transport, Inc., et al.* (United States Court of Appeals No. 11,115 and No. 136 in this court) to the District Court for further proceedings in accordance with the opinion dated June 12, 1952, of the judge who previously voted to remand the case. That opinion was as follows:

> "One judge is of opinion (1) that the decisive question is whether the specific prescriptions of the new Regulation are or are not a proper, or reasonable, definition of the undefined terms ('regularly or with a reasonable degree of regularity') of the original licenses and (2) that that question is a question of fact which must be determined upon factual criteria, devised from studies of actual operations of regular carriers and of irregular carriers, similar to the criteria utilized by the three-judge court in *Brady Transfer & Storage Co.* v. *United States*[19] for like purposes under the Motor Carrier Act, and similar to the data which the Board says it used in formulating the Regulation here involved. Since the present record contains no evidence of that sort, this judge would remand the case to the trial court for the receipt of such evidence and a finding of basic facts and an ultimate finding therefrom as to whether the new Regulation does

[19] 80 F. Supp. 110 (S. D. Iowa 1948), aff'd [illegible] 69 S. Ct. 239 (1948).

or does not in fact change the terms of the existing licenses."

In the course of the proceeding before the Board, petitioner submitted evidence to show that in the absence of the operation of irregular services, such as petitioner had previously conducted, the regular carriers were unable to meet an existing public demand. The Board rejected such evidence and refused to consider it (R. 733). In the case of *CAB et al.* v. *American Air Transport, Inc., et al., supra,* the court below held that in order to determine whether the prescriptions of a new regulation issued by the Board are proper that such a determination must be made "upon factual criteria devised from studies to regular carriers and of irregular carriers." In the instant case the Board refused to consider such evidence.

In affirming the decision of the Board, the Court below necessarily holds that such factual criteria are not necessary in the instant case although the court below specifically remanded, on November 20, 1952 [20] an analogous case for the purpose of a hearing to develop such factual criteria. That action, taken later than its action in the instant case, shows an inconsistency of action that calls for an exercise in the instant case of this Court's power of supervision.

The Court below failed to pass upon a major issue, i.e., whether the Board correctly excluded evidence of the public interest. When the Board issued petitioner its Letter of Registration, it found that petitioner's operation was in the public interest. There has been no finding that the continuance of this Letter of Registration will not be in the public interest, and absent such finding by the Board, the revocation was without authority of law.

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[20] No. 11,115, U. S. Circuit Court of App. D. C., opinion November 20, 1952, as yet unpublished.

Petitioner sought to introduce evidence with respect to the public interest and the public convenience and necessity of petitioner's operations between Seattle and Alaska, but the Examiner and the Board refused to receive or consider such evidence, thereby thwarting the very public interest which supports the regulation claimed to be violated. That evidence should have been admitted, and, if it were considered, a different conclusion would probably have been reached.

Somewhere in the course of this type of litigation, evidence with respect to the propriety of the administrative ruling should be admitted and considered. See *Gibson Wine Company* v. *Snyder*, U. S. App. D. C., 194 F. 2d 329. In the cited case, the Court was divided on the issue of whether the agency or the District Judge should consider the evidence, but the Court made it clear that the evidence was proper, and a majority of the Court relied upon this type of evidence for decision. In the instant case, the agency unlawfully rejected such evidence.

The Board has declared by official action that 88.9% of the transportation performed by large irregular air carriers was assertedly performed illegally; that only .8% of the transportation performed by large irregular air carriers was transportation legally performed; but it has expressed no opinion on only 10.3% of the transportation performed by large irregular air carriers (R. 637). Only an insignificant fraction of the Large Irregular Air Carriers could exist within such regulations.

If a regulation is just and reasonable, the majority will comply and only the minority will be violators. However, the unjustness and unreasonableness of this regulation is attested to by the fact that only the amazingly low percentage of 8/10 of 1% of the carriers show operations in accordance with the regulations as determined by the Board (R. 631-637).

The analysis of the operations performed by the carriers approved as operating properly under the regulation (R. 653-660) shows that not even one of the carriers approved by the Board was dependent upon air transportation for the greater part of their revenues. This, therefore, clearly demonstrates the unjustness and unreasonableness of Regulation 291 as applied to Large Irregular Air Carriers. The small fraction of transportation performed by the carriers approved as operating properly under the regulation could be performed only because such carriers were not dependent upon air transportation to provide revenues to sustain them. The Board adopted and applied to Large Irregular Air Carriers, including petitioner, and revoked petitioner's license upon the basis of, a regulation which was in fact "unjust and unreasonable" (R. 631-637), and contrary to Section 416 of the Civil Aeronautics Act (49 U.S.C. 496).

On August 13, 1947, Chairman Landis of the Civil Aeronautics Board wrote to Senator Magnuson, as follows:

> "As you indicate, strict application of the terms of this regulation would appear to require, in the case of a tariff specifiying an infinite number of charges applicable between all conceivable combinations of points. Actually our studies indicate that carriers operating the larger transport types of aircraft (the carriers operating aircraft grossing less than 10,000 pounds each do not file tariffs) tend to confine the bulk of their operations to a relatively few points. *Such practice is not inconsistent with the concept of irregular operations set forth in section 292.1.*" (*Italics supplied.*) (Hearings before a Subcommittee of the Select Small Business Committee, U. S. Senate, 82d Congress 1st Sess., on Role of Irregular Airlines in U. S. Air Transportation Industry, Apr. 23, 24, 25, 27, 30, May 1 and 5, 1951, page 148.)

Regulations are valid only as subordinate rules and when found to be within the framework of the policy which the

legislature has sufficiently defined. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51. It is a wholesome and necessary principle that an administrative agency must pursue the procedure and rules enjoined upon it by the statute creating it, and show a substantial compliance therewith, to give validity to its action. See *Panama Refining Co.* v. *Ryan, supra.* Administrative regulations which go beyond what the legislature has authorized have been said to be void and may be disregarded. See *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387; *Illinois C. R. Co.* v. *McKendree*, 203 U. S. 514, 51 L. Ed. 298, 27 S. Ct. 153.

The Board held, in its formal opinion, that the regulation concerned was clear, unambiguous, and susceptible of understanding. Yet, the Board, in order to give this regulation the specificity which petitioner has challenged and the Board has denied, has found it necessary to attempt to interpret this regulation in terms of specific numbers of flights per calendar month. However, even this numerical norm has not been constant. At one time, 12 flights per calendar month, was "irregular" and "infrequent." Later it was 10 flights, and in the Opinion of May 25, 1950, it was eight flights as between some pairs of points, and only three flights as between other pairs of points. This shows that the term "regularity" and "frequency" as expressed in Sec. 291.1, falls short of the standards of clarity and precision required for rules and regulations having the force and effect of Law.

This position is firmly sustained by a long line of cases which are cited in *U. S.* v. *Cohen*, 255 U. S. 81, 89, 65 L. Ed. 516, 520. This court in that case said:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is,

whether the words, 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. * * * And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

"That it results from the consideration which we have stated that the section before us was void, for repugnancy to the Constitution, is not open to question. *United States* v. *Reese*, 92 U.S. 214, 219, 220, 23 L. ed. 563, 565; * * *"

## Conclusion

As the court below has decided an important question of Federal law, has decided a Federal question in a way probably in conflict with an applicable decision of this court, has misinterpreted important statutes of the United States, decided questions of substance relating to the application of the Constitution, and has not given proper effect to an applicable decision of this court, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WARREN E. MILLER,
*Attorney for Petitioner.*

## APPENDIX

### Pertinent Statutes and Regulations

Administrative Procedure Act (5 U. S. C.):

"Sec. 1001(e). 'License' includes the whole or part of any agency permit, certificate, approval, registration, charter membership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license."

"Sec. 1003(a). General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

"Sec. 1004. Adjudications

* * * * * * *

"Procedure

"(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent,

hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title."

"Sec. 1008. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

"In the exercise of any power or authority—

"(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

"(b) . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. . . ."

CIVIL AERONAUTICS ACT OF 1938, AS AMENDED:

"Sec. 401 [52 Stat. 987, 49 U. S. C. 481] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided*, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein."

"Sec. 401(c) [52 Stat. 987, 49 U. S. C. 481] . . .

"(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any in-

terested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible."

*"Terms and Conditions of Certificate*

"Sec. 401(f) [52 Stat. 987, 49 U. S. C. 481] . . .

"(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment therto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Authority shall deem practicable; and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special serv-

ice, without regard to the points named in its certificate, under regulations prescribed by the Authority."

"Sec. 401 [52 Stat. 987, 49 U. S. C. 481] . . .

(h) The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority [Board], with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

"Sec. 416 [52 Stat. 1004, 49 U. S. C. 496] . . .

"(a) The Authority [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority [Board] finds necessary in the public interest."

"Exemptions

"(b) (1) The Authority, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the require-

ments of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

"(2) The Authority shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B) to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Authority finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Authority to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots."

"JUDICIAL REVIEW OF AUTHORITY'S ORDERS

"Orders of Authority Subject to Review

"SEC. 1006 [52 Stat. 1024, 49 U. S. C. 646]

* * * * * * *

*"Certification or Certiorari*

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code."

REGULATIONS SERIAL NUMBER 388

ADOPTED BY THE CIVIL AERONAUTICS BOARD
AT ITS OFFICE IN WASHINGTON, D. C. ON THE 5TH DAY
OF MAY, 1947

The Civil Aeronautics Board, having held a hearing and issued its opinion in the Investigation of Non-Scheduled Air Service, Docket No. 1501, relating to non-certificated air carriers,[21] having circulated for comment a draft and thereafter a revised draft of proposed regulation relating to non-certificated air carriers, having considered written comments and oral argument thereon in Docket No. 2742, and having also considered other data and information [22] available to the Board, finds as follows:

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[21] As used herein the term "non-certificated air carriers" refers to air carriers engaging in air transportation which do not hold certificates of public convenience and necessity issued by the Board, and the term "certificated air carriers" refers to air carriers which do hold such certificates.

[22] Such data and information include, among other things, the reports heretofore filed with the Board pursuant to Section 292.1 of the Economic Regulations, data obtained in investigations made by the enforcement staff of the Board, financial Forms 41, 2380 and 2780, and other reports filed with the Board by the certificated air carriers, informal complaints filed against non-certificated air carriers, and applications for air carrier operating certificates filed with the Civil Aeronautics Administration pursuant to Part 42 of the Civil Air Regulations.

1. Since 1938 there has been in effect an exemption regulation adopted by the Board which exempts non-certificated air carriers from all provisions of Title IV of the Civil Aeronautics Act (other than sections 401(1) and 407(a), and, since June, 1946, section 411) so long as they engage only in irregular services as defined in such regulation. At the time such regulation was originally adopted the Board believed it was undesirable to provide for the detailed economic regulation of the operations of such carriers without further study. Since that time and particularly following the close of the war, the Board has accumulated information and data which indicate that the aggregate operations of such carriers have increased in scope and importance, and that operations by individual carriers are frequently extensive. Some such operations have been conducted with little regard to the responsibility and duty owed to the public by a common carrier with respect to service, and have resulted in numerous complaints to the Board concerning tariff and operating practices, including but not limited to failure of such carriers to perform the service agreed upon, great variations in the fares and rates charged by the same carrier for comparable service, failure to make refunds to passengers and shippers for transportation not performed, misrepresentation of equipment, facilities and services, and use of inadequate and makeshift equipment and facilities. Both the protection of the public from improper practices by such non-certificated air carriers and protection of the certificated carriers against unregulated competition require that additional regulatory provisions of the Civil Aeronautics Act be now made applicable to such non-certificated air carriers.

2. In addition to the public demand and need for air transportation services furnished by the certificated air carriers on regularly scheduled operations, there is public demand and need at the present time for air services on an irregular basis both to certificated and non-certificated points. Such irregular services vary greatly with respect to type of service, and fill a need which, because of fluctuations in the demand and the impossibility of determining where and when the demand will arise, by its very nature

cannot be fulfilled economically by carriers operating on regular schedules and routes. Such services can be performed by non-certificated air carriers, and because of their knowledge of local conditions or willingness to perform specialized types of services such services can frequently be performed by them more adequately, economically and quickly than by certificated carriers. To require the certification of such carriers at the present time would be impracticable because it would be necessary to issue a certificate of public convenience and necessity which would either impose no substantial limitations upon operations or which would substantially reduce the flexibility and usefulness of the operations of such carriers. Certification, in the case of many small scale operations, would be uneconomical and would tend to prevent or retard the development of new types of services designed to meet special conditions. Because of the fact that irregular services meet a different need and must be infrequent and irregular, such services, if properly regulated under provisions of the Act other than those relating to certificates of public convenience and necessity, will not under present conditions have adverse competitive effect upon the services performed by the certificated air carriers.

3. In view of the considerations mentioned in paragraphs 1 and 2 hereof, and in order to insure the flexibility in the conduct of irregular services which is implicit in exemption of non-certificated air carriers from certification, Irregular Air Carriers, as defined in Section 292.1 below, should continue to be exempted from the requirements of section 401 of the Act other than subsection (1). Protection of the public and the orderly development of the air transportation system in accordance with the objectives of section 2 of the Act, however, require that certain provisions of the Act which are not directly related to the certification provisions of the Act should be made applicable to the Irregular Air Carriers utilizing equipment of substantial size. Such carriers are now subject to sections 401(1), 407(a) and 411, and these requirements should be continued. In addition, such carriers should now be made subject to sections 403, 404(b), 407(b), 407(c), 407(d),

407(e), 409(b), 410, 415 and 416; and to the requirements of section 404(a), relating to safe service, equipment and facilities. In addition, such carriers should be made subject to the provisions of sections 408, 409(a), 412, 413 and 414, except to the extent, as more fully set forth in paragraph (c) of Section 292.1 below, that such provisions involve other Irregular Air Carriers.

4. A portion of the irregular air service now being performed is performed by small air carriers operating a limited number of planes of small size. From reports submitted to the Board it appears that non-certificated air carriers operating one or more aircraft having a gross take-off weight in excess of 10,000 pounds constituted less than 20 percent of the total number of non-certificated air carriers, but flew approximately 30 percent of the total revenue passenger miles flown by all such carriers. It would thus appear that Irregular Air Carriers operating aircraft under 10,000 pounds may be subjected to a much lesser degree of economic regulation without materially affecting the over-all air transportation system. Such operations are limited in scope, do not represent a serious threat to certificated operations, and extensive regulation thereof at this time would be unduly burdensome and costly to such carriers, would tend to increase the cost and impair the value of such services to the public, and would impose unnecessary additional administrative burden upon the Board. Accordingly, such Irregular Air Carriers should not be made subject to sections 403, 404(b), 407(b), 407(c), 408, 409(a), 410 and 412, but should be made subject to all other provisions of the Act to which the Irregular Air Carriers utilizing equipment of substantial size are subject.

In drawing the line between the Irregular Air Carriers utilizing equipment of substantial size and the Irregular Air Carriers which utilize only smaller equipment, the Board finds that the use of a single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds would involve an operation of substantial size in relation to the service offered to the public and the competitive effect upon other air carriers; and that the use of aircraft units having an allowable gross take-off weight between 6,000 and

10,000 pounds and an aggregate gross take-off weight in excess of 25,000 pounds would likewise involve a substantial operation.

5. Section 292.1 of the Economic Regulations as revised herein, unlike the exemption heretofore in effect does not provide for exemption from the Act with respect to the carriage of persons in foreign air transportation. The Board finds that notwithstanding the findings in paragraphs 2 and 3 hereof the continuation of the exemption with respect to such transportation is no longer justified in view of the recent substantial extension of our international air transportation system, as well as the recent award of foreign air carrier permits, and in view of the smaller traffic potential which the Board finds to exist in the field of international air transportation as compared with interstate and overseas air transportation.

6. As a condition to the grant of the exemptions provided for in Section 292.1 below, such section will provide for letters of registration to be issued to Irregular Air Carriers, for quarterly operation reports, and for special reports on the institution of service with large aircraft by such carriers theretofore utilizing only small aircraft. These requirements are deemed necessary in order that the Board may maintain adequate supervision and obtain information with respect to exempted operations.

7. Unless specific provision were made herein the officers and directors of Irregular Air Carriers otherwise would be subject to the interlocking relationships provisions of section 409 of the Act, even though the Irregular Air Carriers in which they hold the positions are wholly or partially exempted from such provisions by the terms of Section 292.1 below. The Board's statutory powers to grant exemptions from provisions of Title IV of the Act extend only to air carriers and not to individuals or persons other than air carriers. Certain interlocking relationships as specified in section 409 occupied by such persons are lawful only if approved by the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby. The Board has determined in this regard that since it is granting exemption to

certain Irregular Air Carriers from the requirements of section 409 with respect to certain relationships, a due showing within the meaning of the statute to justify approval of an interlocking relationship, upon application filed by an officer or director of an Irregular Air Carrier, would be made by a showing that such carrier itself had been granted an exemption from the necessity of obtaining approval. To require each such officer or director to file such an application and make such a showing, however, would appear to impose a useless administrative burden upon the Board and would not be conducive to the proper dispatch of business and to the ends of justice. The Board has determined, therefore, that such showing by all such officers and directors individually shall be presumed to have been made, and upon the basis thereof has granted blanket approval of such interlocking relationships in Section 292.1 below.

8. In view of the foregoing considerations, the present enforcement of the provisions of Title IV, except to the extent required in Section 292.1 below, would be an undue burden on Irregular Air Carriers by reason of the limited extent of, and the unusual circumstances affecting the operations of such carriers, and would not be in the public interest.

On the basis of the foregoing findings and pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a) and 416(b) thereof, and for the purpose of providing for the economic regulation of services conducted on an irregular basis by non-certificated air carriers, the Civil Aeronautics Board hereby amends Section 292.1 of the Economic Regulations in its entirety to read as follows effective June 10, 1947:

SECTION 292.1 OF THE ECONOMIC REGULATIONS IRREGULAR AIR CARRIERS

(a) *Applicability.*—This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any non-certificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pur-

suant to exemption created by any other section of the Economic Regulations.

(b) *Classification.*—There is hereby established a classification of non-certificated air carriers to be designated as "Irregular Air Carriers". An Irregular Air Carrier shall be defined to mean any air carrier (1) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, (2) which directly engages in interstate or overseas air transportation of persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a "point" shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place.

(c) *Exemptions.*

(1) *General.*—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:

(i) Subsection 401(1) (Compliance with Labor Legislation);

(ii) Section 403 (Tariffs);

(iii) Subsection 404(a) (Carrier's Duty to Provide Service, etc.), only in so far as said subsection requires air carriers to provide safe service, equipment, and facilities in connection with air transportation;

(iv) Subsection 404(b) (Discrimination);

(v) Subsection 407(a) (Filing of Reports): *Provided,* That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(a) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(vi) Subsection 407(b) (Disclosure of Stock Ownership);

(vii) Subsection 407(c) (Disclosure of Stock Ownership by Officers or Directors);

(viii) Subsection 407(d) (Form of Accounts): *Provided,* That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(d) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(ix) Subsection 407(e) (Inspection of Accounts and Property);

(x) Section 408 (Consolidation, Merger, and Acquisition of Control): *Provided,* That Irregular Air Carriers shall be exempt from section 408 in so far as said section would make it unlawful, without prior approval by the Board, (*a*) for any Irregular Air Carrier or any person controlling any such carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of another Irregular Air Carrier, (*b*) for any Irregular Air Carrier to consolidate or merge with another Irregular Air Carrier, and (*c*) for any Irregular Air Carrier or any person controlling any such air carrier to acquire control of another Irregular Air Carrier; *Provided further,* That any Irregular Air Carrier which consolidates or merges with another Irregular Air Carrier and any Irregular Air Carrier or any person controlling any such carrier that acquires control of, or purchases, leases, or contracts to operate the properties, or any substantial part thereof, of another Irregular Air Carrier pursuant to the exemption granting herein, shall submit to the Board, not more than 30 days following the consummation of the transaction, a report indicating in reasonable detail the nature and result of the transaction.

(xi) Subsection 409(a) (Interlocking relationships): *Provided,* That if an application by any Irregular Air Car-

rier for approval of an interlocking relationship in existence on the effective date of this section is filed with the Board prior to a date 30 days after the effective date of this section, such air carrier may retain the officer, director, member, or stockholder involved in such relationship pending final disposition by the Board of said application: *Provided further*, That Irregular Air Carriers shall be exempt from subsection 409(a) in so far as said subsection would make it unlawful, without prior approval by the Board, (*a*) for any Irregular Air Carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in another Irregular Air Carrier, (*b*) for any Irregular Air Carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in another Irregular Air Carrier;

(xii) Subsection 409(b) (Profit from Transfer of Securities);

(xiii) Section 410 (Loans and Financial Aid);

(xiv) Section 411 (Methods of Competition);

(xv) Section 412 (Pooling and Other Agreements): *Provided*, That Irregular Air Carriers shall be exempt from section 412 until 60 days after the effective date of this section: *Provided further*, That Irregular Air Carriers shall be exempt from section 412 in so far as said section would require any Irregular Air Carrier to file with the Board a copy or a memorandum of certain contracts or agreements (other than contracts or agreements for pooling or apportioning earnings, losses, traffic, service or flying equipment), or of modifications or cancellations thereof, between such carrier and any other Irregular Air Carrier;

(xvi) Section 413 (Form of Control);

(xvii) Section 414 (Legal Restraints);

(xviii) Section 415 (Inquiry into Air-Carrier Management);

(xix) Section 416 (Classification and Exemption of Carriers).

(2) *Additional Exemptions for Irregular Air Carriers Utilizing Small Aircraft.*—Subdivisions (ii), (iv), (vi), (vii), (x), (xi), (xiii) and (xv) of subparagraph (1) of this paragraph shall not apply to any Irregular Air Carrier which does not utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft units (not including any aircraft unit having an allowable gross take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds.

(3) *Additional Temporary Exemptions in Foreign Air Transportation.*—Notwithstanding any other provisions of this section, Irregular Air Carriers for a period of three months after the effective date of this section, shall, with respect to foreign air transportation of persons, be exempt from all provisions of sections 401 (except subsection 401(1)) and 403 of the Civil Aeronautics Act of 1938, as amended, only, however, to the extent that such foreign air transportation of persons is confined to operations of the type exempted under section 292.1 prior to this revision of such section.

(4) *Approval of Certain Interlocking Relationships.*—To the extent that any officer or director of an Irregular Air Carrier would, without prior approval by the Board, be in violation of any provision of subsection 409(a) (3) of the Civil Aeronautics Act of 1938, as amended, by reason of any interlocking relationship with another Irregular Air Carrier, such relationship is hereby approved.

(5) *Effect on Other Statutes.*—The exemptions hereinabove granted from certain provisions and requirements of sections 408, 409, and 412 shall not constitute an order made under such sections, within the meaning of section 414, and shall not confer any immunity or relief from operation of the "antitrust laws," or any other statute (except the Civil Aeronautics Act of 1938, as amended), with respect to any transaction, interlocking relationship or agreement otherwise within the purview of such section.

(5) *Operational Reports by Irregular Air Carriers.*—On or before July 20, 1947, and thereafter on or before

the 20th day of every October, January, April and July, each Irregular Air Carrier, except those Irregular Air Carriers utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, shall file with the Board a quarterly operational report covering the period of the three preceding calendar months, showing all flights operated in air transportation during such period, and stating, with respect to each such flight, the dates of departures and arrivals and the origin, destination and intermediate points served. Whenever any Irregular Air Carrier theretofore utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, undertakes to utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft units (not including any aircraft unit having an allowable gross take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds, such Irregular Air Carrier shall notify the Board in writing within not more than ten days after the actual commencement of such utilization.

(d) *Registration for Exemption.*

(1) *Letter of Registration Required.*—From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided*, That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Letter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter.

(2) *Issuance of Letter of Registration.*—Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which,

unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date; (ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on C.A.B. Form No. 2789 which is available on request for the convenience of applicants.

(3) *Non-transferability of Letter of Registration.*—A Letter of Registration shall be nontransferable and shall be effective only with respect to the person named therein.

(4) *Suspension of Letter of Registration.*—Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

(5) *Revocation of Letter of Registration.*—Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations.

(e) *Separability.*—If any provision of this section or the application thereof to any air transportation, person, class of persons, or circumstance is held invalid, the remainder of the section and the application of such provisions to other air transportation, persons, classes of

persons, or circumstances shall not be affected thereby. (52 Stat. 984 and 1004, as amended; 49 U. S. C. 425a and 496b).

Note: The record-keeping and reporting requirements of this section have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

By the Civil Aeronautics Board:

(S.) M. C. MULLIGAN,
*Secretary.*

(SEAL.)

Regulations
Serial Number ER-136

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington 25, D. C.

Economic Regulations
Interpretation No. 1 to §292.1
Adopted: December 10, 1948

IRREGULAR AIR CARRIERS

The following interpretation of the Economic Regulations §292.1, in the form of illustrative examples of "irregular" air transportation as therein defined, is being promulgated pursuant to section 205(a) of the Civil Aeronautics Act and Sec. 3(a) of the Administrative Procedure Act. It is adopted as part of the regulations. Its purpose is to assist irregular air carriers to conduct their operations in conformity with the Act and §292.1 of the Economic Regulations.

In consideration of the foregoing, the Civil Aeronautics Board hereby issues the following interpretation of §292.1:

Examples of Irregular Air Transportation within the Meaning of Section 292.1

For the guidance of Irregular Air Carriers and other interested parties the Board here sets forth a number of

illustrative examples of irregular and regular service. All Irregular Air Carriers should study these examples, for the Board expects to use them as standards to apply to the operations of such Carriers.

It should be noted that all of the illustrations included here refer only to actual operations. Such operations indicate a course of conduct constituting the holding out of regular or irregular service, as the case may be. The holding out of regular service may also be brought about by means other than actual operations—for example, although its services are operated irregularly, a carrier may be holding out regular service by reason of the nature and extent of its advertising and traffic solicitation efforts. In other words, an Irregular Air Carrier is not immune from enforcement action if its actual *operations* are irregular but all the circumstances surrounding its business show that the carrier is *holding out* regular service.

The illustrations included represent application of the principles announced in *Page Airways, Inc., Investigation*, 6 C.A.B. 1061, *Trans-Marine Airways, Inc., Investigation of Activities*, 6 C.A.B. 1071, and *Investigation of Non Scheduled Services*, 6 C.A.B. 1049, and more particularly of the cease and desist order entered in the *Matter of the Noncertificated Operations of Trans Caribbean Air Cargo Lines, Inc.*, Order Serial No. E-370, adopted March 14, 1947. This is emphasized because the Board is not attempting by revision of section 292.1 either to enlarge or contract the scope of operations permitted by the regulation.

(1) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the month which are encircled on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| (1) | 2 | 3 | 4 | 5 | 6 | 7 |
| (8) | 9 | 10 | 11 | 12 | 13 | 14 |
| (15) | 16 | 17 | 18 | 19 | 20 | 21 |
| (22) | 23 | 24 | 25 | 26 | 27 | 28 |
| (29) | 30 | 31 | | | | |

Since these flights are conducted on the same day of each week, the service is not irregular within the meaning of

the regulation. Moreover, if over a period of weeks an occasional Sunday flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(2) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the month which are encircled on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | 1 | (2) | 3 | (4) | 5 | 6 |
| 7 | 8 | (9) | 10 | (11) | 12 | 13 |
| 14 | 15 | (16) | 17 | (18) | 19 | 20 |
| 21 | 22 | (23) | 24 | (25) | 26 | 27 |
| 28 | 29 | (30) | | | | |

These flights are conducted regularly, twice a week, without frequent and extended definite breaks in service and are obviously not irregular within the meaning of the regulation. Moreover, if over a period of weeks an occasional flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(3) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the month which are encircled on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | — | (1) | 2 | 3 | 4 |
| 5 | 6 | (7) | 8 | 9 | 10 | 11 |
| 12 | (13) | 14 | 15 | 16 | 17 | (18) |
| 19 | 20 | 21 | (22) | 23 | 24 | 25 |
| (26) | 27 | 28 | 29 | (30) | | |

These flights are conducted at regularly recurring periods, or substantially regular periods (every 4, 5 or 6 days), and therefore do not achieve infrequency and irregularity of service through frequent and extended definite breaks in service. Such service is not irregular within the meaning of the regulation.

(4) An Irregular Air Carrier operates between points A

and B, in one direction, on the days of the two successive months which are encircled on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | — | — | — | 1 | 2 |
| 3 | 4 | (5) | 6 | (7) | 8 | 9 |
| 10 | (11) | (12) | 13 | 14 | 15 | 16 |
| 17 | 18 | (19) | (20) | 21 | 22 | 23 |
| 24 | (25) | 26 | (27) | 28 | 29 | 30 |
| 31 | | | | | | |

| — | 1 | (2) | 3 | (4) | 5 | 6 |
|---|---|---|---|---|---|---|
| 7 | 8 | 9 | (10) | 11 | 12 | (13) |
| 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 21 | (22) | 23 | 24 | (25) | 26 | 27 |
| (28) | 29 | 30 | (31) | | | |

These flights are conducted twice a week in succeeding weeks without the intervention of other weeks or similar periods at irregular but frequent intervals during which no flights are operated. Such service is not irregular within the meaning of the regulation.

(5) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the two successive months which are encircled on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | — | — | — | (1) | 2 |
| (3) | (4) | 5 | (6) | 7 | (8) | 9 |
| 10 | 11 | (12) | (13) | 14 | 15 | 16 |
| 17 | (18) | 19 | (20) | 21 | (22) | 23 |
| 24 | 25 | 26 | 27 | 28 | 29 | 30 |
| (31) | | | | | | |

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | (1) | 2 | (3) | 4 | 5 | (6) |
| 7 | 8 | (9) | (10) | 11 | 12 | 13 |
| (14) | 15 | (16) | 17 | (18) | (19) | 20 |
| 21 | 22 | 23 | 24 | 25 | 26 | 27 |
| (28) | (29) | 30 | | | | |

In this pattern, unlike the preceding example, two breaks of at least a week occur within a two-month period. However, operations in the other weeks occur with such frequency that the breaks in service are not of sufficient fre-

quency and extent to compensate for the substantial number of flights conducted with frequency over a substantial period. The flights are not irregular within the meaning of the regulation.

(6) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the two successive months which are encircled on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | — | 1 | 2 | (3) | 4 |
| 5 | 6 | (7) | 8 | 9 | (10) | 11 |
| 12 | 13 | 14 | 15 | 16 | 17 | 18 |
| 19 | 20 | (21) | 22 | 23 | (24) | 25 |
| 26 | 27 | (28) | (29) | 30 | 31 | |
| | | | | | | |
| — | — | — | — | — | — | 1 |
| 2 | 3 | (4) | 5 | 6 | (7) | 8 |
| 9 | 10 | 11 | 12 | 13 | 14 | (15) |
| 16 | 17 | (18) | 19 | 20 | (21) | 22 |
| 23 | 24 | (25) | 26 | 27 | (28) | 29 |
| 30 | 31 | | | | | |

The flights do not exceed two per week and the two-month period includes two definite breaks in service. However, in view of the frequent rendition of service on Tuesdays and Fridays the breaks in service and comparatively small number of flights operated are not sufficient to destroy the pattern of regularity. The service is not irregular within the meaning of the regulation.

(7) An Irregular Air Carrier operates between points A and B in one direction, on the days of the two successive months which are encircled on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | 1 | (2) | 3 | (4) | 5 | (6) |
| 7 | (8) | 9 | (10) | 11 | (12) | 13 |
| 14 | 15 | 16 | 17 | 18 | 19 | (20) |
| 21 | (22) | 23 | (24) | 25 | (26) | 27 |
| (28) | 29 | (30) | 31 | | | |
| | | | | | | |
| — | — | — | — | (1) | 2 | (3) |
| 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| (11) | 12 | (13) | 14 | (15) | 16 | (17) |
| 18 | (19) | 20 | (21) | 22 | (23) | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | (31) |

These flights are operated every other day except for infrequent breaks. Such service is not irregular within the meaning of the regulation.

(8) Four Large Irregular Air Carriers agree to utilize the services of a single ticket agency, XYZ Ticket Agency, Inc., with respect to service between points A and B, and to furnish to the agent the dates upon which each will operate between A and B. If the flights, considered in combination, of such carriers between A and B reveal a pattern of operations similar to those shown in examples (1) through (7) above, the combination of flights constitute regular air transportation and each such carrier is deemed to be conducting regular operations between A and B.

(9) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the month which are encircled on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | (1) | 2 | 3 | 4 | 5 |
| 6 | 7 | 8 | (9) | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | (17) | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 | (26) |
| 27 | (28) | 29 | 30 | 31 | | |

These flights are conducted on a different day of each week, and are operated only after frequent and definite breaks in service. Although two flights (on the 26th and 28th) were operated within one period of less than one week, this frequency was compensated for by the breaks of at least a week between the other flights. The flights are therefore irregular within the meaning of the regulation.

(10) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the two successive months which are encircled on the following calendar table (numerals above and to the right of encircled dates indicate the number of flights operated on those dates):

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | 1 | 2 | 3 | 4 | 5 | 6 |
| 7 | 8 | (9) | (10) | 11 | 12 | 13 |
| 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 21 | 22 | 23 | 24 | 25 | 26 | 27 |
| (28) | 29 | 30 | | | | |
| — | — | — | 1 | 2 | 3 | 4 |
| (5) | (6) [2] | (7) [3] | (8) [2] | 9 | 10 | 11 |
| 12 | 13 | 14 | 15 | 16 | 17 | 18 |
| 19 | 20 | 21 | 22 | 23 | 24 | 25 |
| 26 | 27 | 28 | (29) | (30) [2] | 31 | |

These flights are conducted in such manner that frequent, extended and definite breaks in service occur at irregular intervals and therefore the service is irregular within the meaning of the regulation.

By the Civil Aeronautics Board:

(S.) M. C. Mulligan,
*Secretary.*

[SEAL]

Civil Aeronautics Board, Economic Regulations, July 1, 1949

(Amended by ER-151 and ER-154)

## Part 291—Classification and Exemption of Irregular Air Carriers

Note: The following interpretation of Part 291 was adopted by Regulation Serial No. ER-136, 13 F. R. 7769.

*Examples of irregular air transportation within the meaning of Part 291.* For the guidance of irregular air carriers and other interested parties the Board here sets forth a number of illustrative examples of irregular and regular service. All irregular air carriers should study these examples, for the Board expects to use them as standards to apply to the operations of such carriers.

It should be noted that all of the illustrations included here refer only to actual operations. Such operations indicate a course of conduct constituting the holding out of regular or irregular service, as the case may be. The holding out of regular service may also be brought about by means

other than actual operations—for example, although its services are operated irregularly, a carrier may be holding out regular service by reason of the nature and extent of its advertising and traffic solicitation efforts. In other words, an irregular air carrier is not immune from enforcement action if its actual operations are irregular but all the circumstances surrounding its business show that the carrier is holding out regular service.

The illustrations included represent application of the principles announced in *Page Airways, Inc., Investigation*, 6 CAB 1061, *Trans-Marine Airways, Inc., Investigation of Activities*, 6 CAB 1071, and *Investigation of Nonscheduled Services*, 6 CAB 1049, and more particularly of the cease and desist order entered in the *Matter of the Noncertificated Operations of Trans Caribbean Air Cargo Lines, Inc.*, Order Serial No. E-370, adopted March 14, 1947. This is emphasized because the Board is not attempting by revision of Part 291 either to enlarge or contract the scope of operations permitted by the regulation.

(1) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| [1] | 2 | 3 | 4 | 5 | 6 | 7 |
| [8] | 9 | 10 | 11 | 12 | 13 | 14 |
| [15] | 16 | 17 | 18 | 19 | 20 | 21 |
| [22] | 23 | 24 | 25 | 26 | 27 | 28 |
| [29] | 30 | 31 | | | | |

Since these flights are conducted on the same day of each week, the service is not irregular within the meaning of Part 291. Moreover, if over a period of weeks an occasional Sunday flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(2) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | 1 | [2] | 3 | [4] | 5 | 6 |
| 7 | 8 | [9] | 10 | [11] | 12 | 13 |
| 14 | 15 | [16] | 17 | [18] | 19 | 20 |
| 21 | 22 | [23] | 24 | [25] | 26 | 27 |
| 28 | 29 | [30] | | | | |

These flights are conducted regularly, twice a week, without frequent and extended definite breaks in service and are obviously not irregular within the meaning of Part 291. Moreover, if over a period of weeks an occasional flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(3) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | — | [1] | 2 | 3 | 4 |
| 5 | 6 | [7] | 8 | 9 | 10 | 11 |
| 12 | [13] | 14 | 15 | 16 | 17 | [18] |
| 19 | 20 | 21 | [22] | 23 | 24 | 25 |
| [26] | 27 | 28 | 29 | [30] | | |

These flights are conducted at regularly recurring periods, or substantially regular periods (every 4, 5 or 6 days), and therefore do not achieve infrequency and irregularity of service through frequent and extended definite breaks in service. Such service is not irregular within the meaning of Part 291.

(4) An irregular air carrier operates between points A and B in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | — | — | — | [1] | 2 |
| 3 | 4 | [5] | 6 | [7] | 8 | 9 |
| 10 | [11] | [12] | 13 | 14 | 15 | 16 |
| 17 | 18 | [19] | [20] | 21 | 22 | 23 |
| 24 | [25] | 26 | [27] | 28 | 29 | 30 |
| 31 | | | | | | |
| — | 1 | [2] | 3 | [4] | 5 | 6 |
| 7 | 8 | 9 | [10] | 11 | 12 | [13] |
| 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 21 | [22] | 23 | 24 | [25] | 26 | 27 |
| [28] | 29 | 30 | [31] | | | |

These flights are conducted twice a week in succeeding weeks without the intervention of other weeks or similar periods at irregular but frequent intervals during which no flights are operated. Such service is not irregular within the meaning of Part 291.

(5) An irregular air carrier operates between points A and B, in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | — | — | — | [1] | 2 |
| [3] | [4] | 5 | [6] | 7 | [8] | 9 |
| 10 | 11 | [12] | [13] | 14 | 15 | 16 |
| 17 | [18] | 19 | [20] | 21 | [22] | 23 |
| 24 | 25 | 26 | 27 | 28 | 29 | 30 |
| [31] | | | | | | |
| — | [1] | 2 | [3] | 4 | 5 | [6] |
| 7 | 8 | [9] | [10] | 11 | 12 | 13 |
| [14] | 15 | [16] | 17 | [18] | [19] | 20 |
| 21 | 22 | 23 | 24 | 25 | 26 | 27 |
| [28] | [29] | 30 | | | | |

In this pattern, unlike the preceding example, two breaks of at least a week occur within a 2-month period. However, operations in the other weeks occur with such frequency that the breaks in service are not of sufficient frequency and extent to compensate for the substantial number of flights conducted with frequency over a substantial period. The flights are not irregular within the meaning of Part 291.

(6) An irregular air carrier operates between points A and B, in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | — | 1 | 2 | [3] | 4 |
| 5 | 6 | [7] | 8 | 9 | [10] | 11 |
| 12 | 13 | 14 | 15 | 16 | 17 | 18 |
| 19 | 20 | [21] | 22 | 23 | [24] | 25 |
| 26 | 27 | [28] | [29] | 30 | 31 | |
| — | — | — | — | — | — | 1 |
| 2 | 3 | [4] | 5 | 6 | [7] | 8 |
| 9 | 10 | 11 | 12 | 13 | 14 | [15] |
| 16 | 17 | [18] | 19 | 20 | [21] | 22 |
| 23 | 24 | [25] | 26 | 27 | [28] | 29 |
| 30 | 31 | | | | | |

The flights do not exceed two per week and the 2-month period includes two definite breaks in service. However, in view of the frequent rendition of service on Tuesdays and Fridays the breaks in service and comparatively small number of flights operated are not sufficient to destroy the pattern of regularity. The service is not irregular within the meaning of Part 291.

(7) An irregular air carrier operates between points A and B, in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | 1 | [2] | 3 | [4] | 5 | [6] |
| 7 | [8] | 9 | [10] | 11 | [12] | 13 |
| 14 | 15 | 16 | 17 | 18 | 19 | [20] |
| 21 | [22] | 23 | [24] | 25 | [26] | 27 |
| [28] | 29 | [30] | 31 | | | |
| — | — | — | — | [1] | 2 | [3] |
| 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| [11] | 12 | [13] | 14 | [15] | 16 | [17] |
| 18 | [19] | 20 | [21] | 22 | [23] | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | [31] |

These flights are operated every other day except for infrequent breaks. Such service is not irregular within the meaning of Part 291.

(8) Four large irregular air carriers agree to utilize the services of a single ticket agency, XYZ Ticket Agency, Inc., with respect to service between points A and B, and to furnish to the agent the dates upon which each will operate between A and B. If the flights, considered in combination, of such carriers between A and B reveal a pattern of operations similar to those shown in examples (1) through (7) above, the combination of flights constitute regular air transportation and each such carrier is deemed to be conducting regular operations between A and B.

(9) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | — | [1] | 2 | 3 | 4 | 5 |
| 6 | 7 | 8 | [9] | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | [17] | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 | [26] |
| 27 | [28] | 29 | 30 | 31 | | |

These flights are conducted on a different day of each week, and are operated only after frequent and definite breaks in service. Although two flights (on the 26th and 28) were operated within one period of less than one week, this frequency was compensated for by the breaks of at least a week between the other flights. The flights are therefore irregular within the meaning of Part 291.

(10) An irregular air carrier operates between points A and B, in one direction, on the days of the two successive months which appear in brackets on the following calendar table (numerals above and to the left of dates appearing in brackets indicate the number of flights operated on those dates):

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| — | 1 | 2 | 3 | 4 | 5 | 6 |
| 7 | 8 | [9] | [10] | 11 | 12 | 13 |
| 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 21 | 22 | 23 | 24 | 25 | 26 | 27 |
| [28] | 29 | 30 | | | | |
| — | — | — | 1 | 2 | 3 | 4 |
| [5] | [2 6] | [3 7] | [2 8] | 9 | 10 | 11 |
| 12 | 13 | 14 | 15 | 16 | 17 | 18 |
| 19 | 20 | 21 | 22 | 23 | 24 | 25 |
| 26 | 27 | 28 | [29] | [2 30] | 31 | |

These flights are conducted in such manner that frequent, extended and definite breaks in service occur at irregular intervals and therefore the service is irregular within the meaning of Part 291.

§ 291.1. *Definitions*—(a) *Irregular air carrier.* The term irregular air carrier means any air carrier which (1) directly engages in air transportation, (2) does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, and (3) does not operate, or hold out to the public expressly or by course of conduct that it operates, one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity, upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.

(b) *Point.* The term "point" as used in this part shall mean any airport or place where aircraft may be landed or taken off, including the area within a 25-mile radius of such airport or place.